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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Amendment of Section 73.658(k) of the Commission's Rules to Delete the "Off-Network" Program Restriction	)	MMB File No. 920117A
Amendment of Section 73.658(k) of the Commission's Rules to Delete the "Off-Network" Program Restriction	)	MMB File No. 870622A
Constitutionality of Section 73.658(k) of the Commission's Rules ("Prime Time Access Rule")	)	MMB File No. 900418A

REPLY OF THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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July 14, 1994

SUMMARY

The focal point of the attack on the Prime Time Access Rule now appears to be the off-network prohibition. Whereas First Media persists in its constitutional arguments, calls for outright repeal of the Prime Time Access Rule are few and muted. In essence, affiliates embrace the rule as long as it protects them from network encroachment into prime access, but blanch at the allegedly discriminatory effects of the off-network prohibition. For the most part, private interests are invoked, while the public interest considerations underlying the rules are ignored. Proponents of repeal of the rule do dangle a few tasty factual tidbits before the Commission in an effort to excite further action, but at most they suggest the need for a far more probing analysis than they are willing or able to provide. Indeed, nothing said by the various proponents of eliminating or relaxing the rule establishes any crying or urgent need to conduct further inquiry into the operation and effect of the Prime Time Access Rule.

Proponents of repeal, for example, cannot agree whether the Prime Time Access Rule is a success or a failure. They embrace the rule, but then propose gutting it via repeal of the off-network prohibition. They say that they will pay more for off-network programming, but then suggest they really would use little of it.

They complain that the rule does not apply to Fox, but neglect that Fox fails to meet the definitional threshhold for application of the rule because Fox apparently has made a business decision to limit its program schedule. They claim that the emergence of Fox has shrunk the market for off-network programming, but neglect that Fox affiliates used little off-network programming in prime time when Fox provides programming to affiliates. They decry a soft market for off-network programming, but fail to recognize that marketplace forces, not the Commission's rules, have governed off-network program prices.

Finally, the decisions in the *Turner* case and the "finsyn" case completely undermine critical arguments offered in support of relaxation of the rules.

In sum, none of the premises or predicates offered for further examination of the rules via an inquiry, much less a rule making, is sound. Most are unfounded; others are contradictory. Therefore, no further action by the Commission is required or desirable at this time.

TABLE OF CONTENTS

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REPLY OF THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

The Association of Independent Television Stations, Inc. ("INTV"), hereby submits its reply to comments on the above-referenced requests for Commission action with respect to §73.658(k) of the Commission's Rules and Regulations (the "Prime Time Access Rule").

The focal point of the attack on the Prime Time Access Rule now appears to be the off-network prohibition. Whereas First Media persists in its constitutional arguments, calls for outright repeal of the Prime Time Access Rule are few and muted. In essence, affiliates embrace the rule as long as it protects them from network encroachment into prime access, but blanch at the allegedly discriminatory effects of the off-network prohibition. For the most part, private interests are invoked, while the public interest considerations underlying the rules are ignored. Proponents of repeal of the rule do dangle a few tasty factual tidbits before the Commission in an effort to excite further action, but at most they suggest the need for a far more probing analysis than they are willing or able to provide. Indeed, nothing said by the various proponents of eliminating or relaxing the rule establishes any crying or urgent need to conduct further inquiry into the operation and effect of the Prime Time Access Rule.

Indeed, as shown below, none of the premises or predicates offered for further examination of the rules via an inquiry, much less a rule making, is sound. Most are unfounded; others are contradictory. Therefore, no further action by the Commission is required or desirable at this time.

I. INTERVENING COURT DECISIONS LAY TO REST SEVERAL ARGUMENTS RAISED IN SUPPORT OF REPEAL OF THE PRIME TIME ACCESS RULE.

Since initial comments were filed with respect to the three pending petitions, the Supreme Court of the United States has issued its decision in *Turner v. U.S.*, No. 93-44 (decided June 27, 1994), and the United States Court of Appeals for the Seventh Circuit has issued its decision in *Capital Cities/ABC, Inc. v. Federal Communications Commission*, No. 93-3458 *et al.*

(decided July 12, 1994). Both cases bear materially on issues raised by petitioners and commenters in this proceeding. Neither supports the petitioners' and commenters' positions.

First, arguments concerning the constitutionality of the Prime Time Access Rule based on the alleged demise of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) now are completely untenable. In *Turner*, the Court expressly refused to overrule *Red Lion*. Slip op. at 13-14.

Second, the Commission's conclusions about the significance of off-network programming and access time to independent television stations now enjoy judicial affirmation. As the Commission concluded:

> The record clearly establishes that off-network hits draw successful ratings for independent stations during early fringe hours, which is the single greatest revenue producing period for these stations. We also find support in the record for the idea that independent stations would be harmed if they could not obtain hit off-network shows.[1]

Furthermore, the Commission concluded:

> Contrary to CBS' refrain on the question of "cross-subsidization," we believe that by enhancing the financial well-being of independent stations, the "fringe hour" revenue stream inevitably helps to support local programming efforts.... [S]uch efforts further enhance program diversity.[2]

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[1]*Memorandum Opinion and Order*, 8 FCC Rcd 8270, 8294, n.64 (1993), *affirmed sub nom. Capital Cities/ABC, Inc., v. FCC*, No. 93-3458 *et al.* (7th. Cir.,decided July 12, 1994) [citations omitted].

[2]*Id.*

These conclusions lay to rest arguments that the public interest would not be jeopardized if network affiliates wrested popular off-network hits away from independents and scheduled them in prime access.[3]

Third, now that the schedule for further consideration of the remaining financial interest and syndication rules is secure, the FCC need not jump the gun and may *coordinate* any additional proceedings involving the Prime Time Access Rule with the May, 1995, review of the financial interest and syndication rules.[4] The propriety of such a course of action also enjoys judicial approval. In denying First Media's petition for a writ of mandamus, the United States Court of Appeals for the District of Columbia Circuit acknowledged that the FCC had stated that it would "coordinate" any proceedings concerning the Prime Time Access Rule with the May, 1995, review of the financial interest and syndication rules.[5] Again, those who

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[3]Additional Comments of the Office of Communications, UCC, et al., MMB File Nos. 920117A, 900418A, 870622A (filed June 14, 1994) at 6 [hereinafter cited as "UCC"]; Comments of The Coalition to Enhance Diversity, MMB File Nos. 920117A, 900418A, 870622A (filed June 14, 1994) at 22 [hereinafter cited as "Coalition"].

[4]This is not say that the proceedings should be combined. In that regard, whereas INTV posits that no further proceedings are called-for at this time, it does concur with parties urging the Commission to await the opportunity to evaluate the operation of the programming marketplace in the absence of the financial interest and syndication rules before conducting further inquiry into the possible modification of the Prime Time Access Rule. *See, e.g.*, Comments of Viacom, Inc., *MMB File Nos. 920117A, 900418A, 870622A (filed June 14, 1994) at 4-7*[hereinafter cited as "Viacom"].

[5]*Order*, In re: First Media Limited Partnership, No. 94-1080, filed May 26, 1994.

have urged a rush to judgment on the Prime Time Access Rule gain no solace from the court's decision.[6]

These decisions add considerable weight to the burden of proof confronting proponents of repeal of the Prime Time Access Rule or off-network prohibition.

II. CRITICAL ARGUMENTS OFFERED BY OPPONENTS OF THE RULES ARE INCONSISTENT AND CONTRADICTORY.

No coherent or cohesive rationale for repeal of the Prime Time Access Rule or the off-network prohibition is laid out by the proponents of repeal. Many of their arguments are contradictory, conflicting, and internally inconsistent. First, for example, they cannot agree whether the rule is a success or a failure. NBC asserts that the Prime Time Access Rule has failed to achieve its principle goals.[7] Group W, on the other hand, calls the Prime Time Access Rule a "true success story." In reality, of course, the rule has created a continuing market for first-run prime access programming and now

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[6] *See, e.g.,* Comments of National Broadcasting Company, MMB File Nos. 920117A, 900418A, 870622A (filed June 14, 1994) at 24-25 [hereinafter cited as "NBC"].

[7] NBC at 3.

is beginning to achieve its ultimate goal via launch of true prime time syndicated programming on independent stations.[8]

Second, the affiliate interests and their allies readily embrace the Prime Time Access Rule as a means of preventing network encroachment on prime access, but view the off-network prohibition as anathema. Whereas NBC acknowledges the existence of "some justification for limiting to three hours the amount of prime time programming a top 50 market affiliate can accept from its network pursuant to a network affiliation agreement," it continues that "all other restrictions on how the station can program the remaining hour of prime time should be eliminated."[9] Similarly, while favoring repeal of the off-network prohibition, the Network Affiliated Stations Alliance ("NASA") contends that "[t]he rule's prohibition on carriage of first-run network programming in access time continues to protect the ability of local stations to program to the needs and interests of their local communities and remains important to the affiliates."[10] In reality, one may attack the off-

[8]Comments of the Association of Independent Television Stations, Inc., MMB File Nos. 920117A, 900418A, 870622A (filed June 14, 1994) at 34-40 [hereinafter cited as "INTV"]; Comments of King World Productions, Inc., MMB File Nos. 920117A, 900418A, 870622A (filed June 14, 1994) at 3 [hereinafter cited as "King World"] ; Viacom at 2.

[9]NBC at 15. INTV notes that under NBC's approach, network-produced or network-syndicated programming could be broadcast in prime access, provided it were not provided via the network's affiliation agreement with the station.

[10]Comments of The Network Affiliated Stations Alliance, MMB File Nos. 920117A, 900418A, 870622A (filed June 14, 1994) at 3-4 [hereinafter cited as "NASA"].

network provision only by attacking the core rationale of the rule itself.[11] The affiliates cannot have it both ways. The prime access window for first-run programming is either open or closed. It matters not whether it is closed by the insertion of network or off-network programming. In either case, access for first-run syndicated programming is foreclosed. Therefore, if the need to keep the window open persists -- and it does --, the Commission may not permit it to be clogged with either network or off-network programs.[12]

Third, networks and affiliates disagree as to the locus of more substantial bargaining power between them. NBC states, for example, that "affiliated stations now have the leverage in the network/affiliate relationship."[13] The affiliate groups disagree, stating that "the changes in the broader marketplace, though substantial, have not altered the relative balance of power between networks and affiliates...."[14]

Fourth, the proponents of relaxation urge that eliminating the off-network prohibition would cause no harm because affiliates really would not

[11] *See* INTV at 19-20, 33-34.

[12] *See* King World at 5 *et seq.*

[13] NBC at 19, n.27.

[14] NASA at 2-3.

use much off-network programming anyway.[15] After all, they say, "first-run programming is now firmly established as the most popular and lucrative choice for access programming."[16] Then, why do they want the rule repealed -- so they can *not* use what they say they want to be able to use?[17] INTV has no doubt that affiliates want the off-network provision repealed precisely so they can use off-network programming. As CBS states, off-network shows are the "shows most popular with viewers."[18] Moreover, even if the quantity of off-network programming used by the affiliates was insufficient to obliterate fully the market for first-run access programming, the affiliates would skim the cream off the off-network and first-run markets and leave independents with the leftovers. The affiliates hardly may deny that they "are the most well-established stations with the largest potential audiences, which can, therefore,

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[15] Coalition at 21, 24. Some proponents of repeal suggest that permitting affiliates to show off-network programming in prime access will increase prices stations pay for off-network programming, thereby enhancing the value of syndication rights to off-network programming. This in turn, they say, will reduce network license fees. However, how can they say this while at the same time arguing that affiliates will continue to rely most substantially on first-run programming?

[16] UCC at 6.

[17] Extrapolating the allegedly minimal affiliate craving for off-network programming in markets 51-100 is not necessarily an indication of what would happen in the top 50 markets if the off-network prohibition were repealed. *See* Coalition at 24-25. Stations in markets 51-100 enjoy access to a range of successful first-run programs precisely because the market for such programming is "made" in the top 50 markets. If top 50 market stations used off-network programming in lieu of first-run programming, the number of first-run programs available to stations in smaller markets would decline precipitously. *See* King World at 9-10.

[18] Comments of CBS, Inc., MMB File Nos. 920117A, 900418A, 870622A (filed June 14, 1994) at 5.

offer the highest prices."[19] These established affiliates would outbid independents for the hit off-network programs, as they now appear to do often in markets 51-100. For example, as shown in Table 1, INTV's analysis of November, 1992, prime access programming reveals that the several popular off-network hits were shown in prime access more often by affiliates than by independents.

Table 1

Percent of Prime Access Exhibitions

Market Rank	1-50		51-100	
Station Type	Affiliate	Ind/Fox	Affiliate	Ind/Fox
Program				
Roseanne	3.7	96.3	46.2	53.8
Golden Girls	0.0	100.0	68.8	31.2
Cheers	7.4	92.6	54.5	45.5
The Cosby Show	0.0	100.0	100.0	0.0
Murphy Brown	0.0	100.0	43.8	56.2

The loss of these programs to independents in the top 50 markets as well would cause far more damage in those markets because more independents

[19] Coalition at 10.

are competing for off-network programming in the top 50 markets than in markets 51-100.[20]

Fifth, while the Coalition is claiming that independent stations do not and would not rely on the "subsidy" provided by exclusive use of off-network programming in prime access to provide local news and other "public interest" programming, NBC is arguing with equal vigor that the financial strength derived from affiliation with an emerging network would help independent stations with the "purchase more popular syndicated programs and the production of local programs, such as news and public affairs."[21] In any event, the Commission itself already has concluded that independents have been able to sustain their service (including news and public affairs) in no small part due to their "off-network" franchise during early fringe and prime access.[22] Even the proponents of repeal acknowledge that:

> Over-the-air television broadcasting remains the most watched medium, and thus one of great importance. Indeed, for almost 40% of the television households (i.e., those not on cable), it represents the universe of television. Thus, if the off-network

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[20] This also suggests the response to claims that the Prime Time Access Rule should apply in all markets, *i.e.*, in terms of assuring independent's access to hit off-network programming, the greater demand for such programming from the larger number of stations in the top 50 markets is more likely to outstrip the finite and limited supply of off-network hits than in smaller markets with fewer stations. *See* UCC at 5.

[21] Coalition at 22-24; NBC at 8.

[22] *See* INTV at 35-38.

> programming restriction were shown to still serve the public interest in this vital sphere, it should be retained.[23]

Indeed, it should!

Sixth, proponents complain of the purported wealth transfer from affiliates (and networks) to first-run syndicators, but then turn right around and argue for a redirection of that wealth transfer from first-run syndicators to off-network syndicators (and networks).[24] The Commission has stressed, and properly so, that it is not in the business of meting out benefits to one industry or another.[25] Moreover, the public interest remains paramount, a factor roundly neglected by proponents of repeal of the rule. As INTV and others have demonstrated, the Prime Time Access Rule and off-network prohibition serve the *public interest* by promoting voice diversity and program diversity in local markets.[26] As pointed out by NATPE International:

> By promoting the growth of independent program suppliers and independent television stations, the PTAR has succeeded in increasing program diversity for television viewers while fueling competition in the domestic and international program production areas. The Rule has also contributed to the Commission's goal of diversity in programming, not simply because of the non-network programming aired in the access

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[23] UCC at 5.

[24] Coalition at 7; UCC at 5; NBC at 21.

[25] *See* INTV at 22.

[26] INTV at 38-39.

> period in the top 50 markets, but by virtue of the diverse programming that local stations produce and air in non-prime time hours, often with the added revenues that are generated with PTAR-related programming.[27]

The issue, thus, hardly is the transfer of wealth from one industry to another; every industry involved would like to be the beneficiary of a government sponsored transfer of wealth. The ultimate beneficiary in the Commission's view necessarily is the public. Even repeal proponent NBC states that "[t]he Commission must determine whether there is any public interest basis for continued regulation...."[28] Therefore, arguments from the proponents of repeal which focus on inter-industry wealth transfers *per se* miss the point and are largely immaterial.

III. NO VALID PREMISE HAS BEEN OFFERED FOR PURSUING ELIMINATION OF THE OFF-NETWORK PROHIBITION.

In those instances where the proponents of repeal manage to avoid contradictory arguments, they still fail to establish any valid basis for repeal. First, the proponents of repeal decry that the Prime Time Access Rule does not apply to Fox.[29] No arbitrary discrimination is involved here, however. If and when Fox elects to provide programming in an amount sufficient to

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[27] Comments of NATPE International, MMB File Nos. 920117A, 900418A, 870622A (filed June 14, 1994) at 2 [hereinafter cited as "NATPE"].

[28] NBC at 3.

[29] *See* UCC at 7; NASA at 9; Coalition at 13-1; Group W at 4.

trigger the rule, it will be subject to the rule. For the moment, Fox apparently has made a business decision to operate at a level which does not fall within the network definition for purposes of the Prime Time Access Rule. That same option is available to any established, emerging, or nascent network. The same rule applies to all.

Second -- and also Fox-related -- some advance the "Honey, Fox shrunk the market" theory, at least with respect to off-network programming.[30] They posit that Fox affiliates no longer schedule off-network programming in prime time (as they did *ante*-Fox), thereby diminishing demand and driving down the prices and revenue potential of a network program in off-network syndication. This theory rests on the utterly false premise that then-pure independent, now Fox-affiliated stations, scheduled off-network programming during prime time. As reported in an overview of the independent television industry in 1986 -- prior to the emergence of Fox --, independent stations typically scheduled feature films programming -- not off-network programming -- during prime time.[31] The Coalition's "but one

[30] *See.,e.g.*, NASA at 9; Coalition at 11-12.

[31] Frazier, Gross & Kadlec, Inc., *Independent Thinking, An Overview of the Independent Television Industry* (1986) at 6-1 [hereinafter cited as *Independent Television*]("The traditional Monday-through-Friday format for an independent has been morning and afternoon cartoons, half-hour sitcoms in early fringe and prime access, followed by movies in prime, followed by half-hour and/or hour strips in late fringe.").

example" is, indeed, "but one example."[32] Thus, suggestions that the market for off-network programming has been eclipsed by Fox (and are likely to eclipsed further by other nascent networks) enjoy no factual predicate.

Third, proponents of repeal tout elimination of the off-network prohibition as the savior of the off-network market, noting a decline in per episode license fees between 1989 and 1993. However, these license fees reflect changes in market factors which have nothing to do with any rule. In the mid-to-late 80s, off-network program prices skyrocketed, a trend which abated in the early 90s. As noted in 1986:

> Independents in multi-independent market environments face program shortages and rapidly escalating prices. The program cost spiral reflects a national phenomenon that has resulted from:
>
> - reduced availability of off-network syndicated series with sufficient episodes for effective stripping;
> - a decreasing number of off-network theatrical features due to increasing network preference for made-for-TV movies and demand for theatricals by pay cable;
> - the rapid expansion of the number of new Independents with an immediate need to acquire extensive program libraries.
>
> In some markets program cost pressure has been exacerbated by aggressive operators who bid up the prices to establish a strong market position rapidly.[33]

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[32] Coalition at 12.

[33] *Independent Thinking* at 6-2 - 6-3.

In short, increased demand accompanied by decreased supply caused prices to rise. Now that demand has stabilized and supply is larger for the moment, prices have dropped. This is no reason to embark on a regulatory rescue. Even assuming a momentary glut in the market, the supply will continue to fluctuate according to the success ratios of network programs and demand will fluctuate with the financial strength of independent television.[34]

In this respect, INTV does not dispute that prices for off-network syndicated programming, nonetheless, would increase if the off-network rule were repealed. This undoubtedly would damage independent stations, which would confront paying more for the same product or licensing less attractive programming. On the other hand, proponents of repeal contend, if syndication rights were, thus, more valuable, a producer could license the same program for first-run network use at a lower price. This view that repeal of the off-network prohibition would stem a supposed trend towards lower network program quality rests on several unstated and untested assumptions. For example, the networks would have to be willing to invest the money saved in production or acquisition of higher quality programming. One legitimately may wonder why they would not simply let

[34] INTV at 29, *citing* Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* at 425 (1980) [hereinafter cited as *Special Staff Report*]. Assertions that the off-network rule has depressed prices for off-network programming in syndication also neglect the boost to prices resulting from improvements in the financial strength of independents as a result of the rule.

such savings fall to the bottom line. One also might wonder with the recent improvements in the networks' financial postures why they would not just go ahead and invest more in first-run network programming regardless of status of the off-network prohibition. What all this confirms is that the arguments advanced in favor of repeal are quite fuzzy and unworthy of more than a jaundiced glance from the Commission.

IV. CONCLUSION

In view of the above, INTV reiterates that no further Commission consideration of modifications to the Prime Time Access Rule is warranted at this time.

Respectfully submitted,

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July 14, 1994

CERTIFICATE OF SERVICE

I,James J. Popham, hereby certify that on this 14th day of July, 1994, I have caused to be served by first-class mail, postage prepaid, a copy of the foregoing "Reply of the Association of Independent Television Stations, Inc.," to the individuals listed below:

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